SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 338

AAA MOTOR LINES, INC., a Corporation,
Petitioner,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, P. C. WHITE TRUCK LINE, INC., a Corporation, and JAMES R. CATON, d/b/a CATON TRANSFER COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Alabama.

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INDEX.

	Page
Prayer	1
Opinions below	1
Jurisdiction	2
Questions presented for review	2
Statutes involved	4
Statement of the case	4
Reasons for granting the writ	12
(a) Procedural due process	15
(b) and (c) The taking of substantive property rights	17
(d) The commerce clause	19
Conclusion	19
Certificate of service	20
Appendix A—Opinion of the Supreme Court of Alabama	21
Appendix B—Findings of fact and conclusions of law	38
Appendix C—Order of the Commission	45
Appendix D—Report and order of the Commission upon reconsideration and rehearing	47
Appendix E—Petition for stay of mandate	50
Appendix F—Order of the Supreme Court of Alabama	52

Cases Cited.

Alabama Public Service Com. v. So. Bell T. & T. Co., 253 Ala. 1, 42 So. 2d 655	18
Alabama Publ. Serv. Com. v. So. Ry. Co., 341 U. S. 341	18

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673 ..... 13, 14, 17

Chicago, B. & O. R. Co. v. Chicago, 166 U. S. 266. 13, 14, 18

In re Frederick, 149 U. S. 70 17

Kreiger v. Shelby R. R. Co., 125 U. S. 39, 45 14

Lash v. State, 244 Ala. 48, 14 So. 2d 229, answer to cert. q. conformed to 31 Ala. App. 121, 14 So. 2d 235 18

Louisville Ferry Co. v. Kentucky, 188 U. S. 395 18

National Asso. for the A. C. P. v. Alabama, 357 U. S. 449, 463 12

Ry. Comm. of Calif. v. Pacific G & E Co., 302 U. S. 388 18

Saunders v. Shaw, 244 U. S. 317 ..... 12, 13, 17

Smith Transfer Co. v. Robins Transfer Co., 253 Ala. 406, 63 So. 2d 351 16

State v. Board of R. R. Com'rs, 131 Mont. 9, 306 P. 2d 264 18

Statutes Cited.

Constitution of the United States:

Article I, Section 8, Clause 3 ..... 3, 4, 19

Fourteenth Amendment 2, 3, 4

Code of Alabama 1940:

Title 48, Sec. 79, 301 (27) 16

28 U. S. C., Sec. 1257 (3) 2

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To the Supreme Court of Alabama.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Alabama, entered in the above entitled case on March 23, 1961.

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama is reported at ... Ala. ..., 131 So. 2d 172, and is appended hereto as Appendix A. The judgment and opinion of the

Circuit Court of Montgomery County, Alabama, is unreported, and is appended hereto as Appendix B. The decisions and orders of the Alabama Public Service Commission dated January 7, 1957, and April 23, 1957, are unreported and are appended hereto as Appendices C and D, respectively. Petitioner's "Petition for Stay of Mandate" filed in the Supreme Court of Alabama on June 28, 1961, and that Court's order of the same date granting said stay are unreported and are appended hereto as Appendices E and F, respectively.

JURISDICTION.

The opinion and judgment of the Supreme Court of Alabama were dated and entered on March 23, 1961. Petitioner filed its petition for rehearing on April 7, 1961, and the same was overruled by the Supreme Court of Alabama on June 22, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1257 (3).

QUESTIONS PRESENTED FOR REVIEW.

1. After petitioner had been operating for many years serving an area of Alabama as a common carrier under a public convenience and necessity certificate granted by the Alabama Public Service Commission, is petitioner deprived of due process of law under the 14th Amendment to the Constitution of the United States by a decision and judgment of the Alabama Supreme Court having the undisputed established fact of public convenience and necessity before it, which decision voids the long-standing rights of petitioner to serve the area on the ground that there was doubt as to the exact quantum of service intended to be authorized, and which decision removed from petitioner all tribunals, administrative or judicial, and all procedures theretofore open to it for the protection of some or all of those long-established rights of service?

2. Has the petitioner been deprived of due process of law under the 14th Amendment to the Constitution of the United States by an opinion and judgment of the Supreme Court of Alabama, rendered unexpectedly at the end of the proceeding, which voided long-existing orders of the Alabama Public Service Commission granting rights to petitioner to serve a certain area of Alabama as a common carrier, on the basis that there was doubt as to the exact quantum of service sought to be authorized?

3. Is it a violation of due process of law or of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States for the Alabama Supreme Court to deprive the public at large of all service by a common carrier undisputedly found to be required by the public convenience and necessity on the ground that as a matter of construction of the order granting the service there is doubt as to the exact quantum of service intended to be authorized?

4. Where there has been a quasi-judicial determination by the Alabama Public Service Commission and a judicial determination by a trial court, both rendered after hearings on evidence, that the public convenience and necessity require service by a common carrier under grant of intra-state rights, and a majority of the goods carried by said carrier in the exercise of such rights are goods moving in interstate commerce, is it a violation of Article I, Section 8, Clause 3 of the Constitution of the United States for the Alabama Supreme Court to deprive the public at large of all service by the common carrier under such rights on the ground that there is doubt as to the exact quantum of service intended to be authorized?

STATUTES INVOLVED.

The Fourteenth Amendment, Section 1, of the Constitution of the United States is involved:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 8, Clause 3 of the Constitution of the United States is involved:

> "The congress shall have power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; . . ."

STATEMENT OF THE CASE.

There are no disputed facts before this Court in this case. There are no statutes and no legislative or administrative actions to review.

Petitioner complains of the act of the Alabama Supreme Court, done unexpectedly at the end of a long series of proceedings, done ex mero motu, which act in and of itself deprives petitioner and the public at large of valuable procedural and property rights guaranteed by the due process clause of the Fourteenth Amendment, and which act is repugnant to the commerce clause of the Federal Constitution.

Petitioner, AAA Motor Lines, Inc. (hereinafter referred to as "petitioner" or "AAA") is a common carrier of

general commodities. At all material times prior to October 7, 1955, it operated under Certificate 936 of the Alabama Public Service Commission (hereinafter referred to as "the Commission") along routes extending from Birmingham, Alabama, on the north, through Montgomery and into an area comprising a portion of southeast Alabama (R. 46-56).

On October 7, 1955, petitioner applied to the Commission for an amendment of its certificate extending its rights so that its routes could serve a new area in South Alabama which was generally west of that position already being served in southeast Alabama (R. 259-276).

After a long public hearing the Commission entered its order on Jan. 7, 1957 (R. 248-249, Appendix C) finding "that the present and future public convenience and necessity require the service hereinafter authorized." It ordered that AAA's certificate be "amended to include in addition to the authority now contained therein authority to operate as a common carrier of general commodities . . . over regular routes as follows," and the extensions asked by AAA then were set out in detail in the order (R. 248-249; Appendix C).

Immediately after the order of Jan. 7, 1957, was entered, AAA commenced to render service over its routes as extended by the order. There was a large demand for AAA's service between the newly-served area and urban centers, and the service rendered was satisfactory to the public (R. 343-414, 460-474, 476-480).

After certain of the carriers who intervened in the trial of this case filed before the Commission a "Petition for Reconsideration or Rehearing" (R. 244-247), and after several continuances were granted on said petition by the Commission (R. 240-242, 238-239, 234-235), oral argument was had thereon on March 12, 1957, but no new evidence was taken (R. 234).

On April 23, 1957, the Commission issued its "Report and Order upon Reconsideration and Rehearing" (R. 230-233), finding that "the present and future public convenience and necessity require the service authorized by the original order in this cause issued January 7, 1957." It again found AAA fit, willing and able. Then, although it made no finding that such a limitation was required by public convenience and necessity, it ordered that the authority contained in the order of January 7 could not be used in combination with the authority contained in AAA's certificate prior to said order, in performing service between points theretofore authorized to be served, on the one hand, and those authorized to be served by the order of January 7, on the other. Apparently the Commission was attempting to prevent the new areas served by the Jan. 7 order from being tacked on to those theretofore served by Certificate 936. That is, the April 23rd order limited AAA's service in the new area to intratown service between the towns therein.

The Commission's attempted limitation of April 23, 1957, read in part (R. 230-233, Appendix D):

> "The authority contained in said order of January 7, 1957, may not be used in combination with the authority contained in Certificate No. 936 prior to January 7, 1957, in performing service between points theretofore authorized to be served in said Certificate No. 936 on the one hand, and those authorized to be served by the said order of January 7, 1957, on the other hand."

The order of limitation of April 23, 1957, made the situation one of chaos and confusion. Petitioner contended before the trial court, and the trial court found (R. 497), that the Commission at all times had treated AAA's application as one for extension of its existing rights, and all parties and witnesses had been concerned with traffic

into the newly-served area from urban centers as Birmingham and Montgomery and out of the area to such centers, and it had been plain throughout that no one involved had in mind or considered the lesser need for intra-town service between the several small towns in the new area (R. 497).

Immediately after the order of April 23, counsel for AAA advised the company that the April 23 order was illegal (R. 496)[1] and commenced negotiations with the Commission (R. 496). Controversy between the carrier and the Commission continued for several months (R. 6-7, 229-230, 309-314) until the parties (including the respondents herein) agreed that the declaratory judgment action, filed in the interim by AAA would take precedent over any actions of the Commission (R. 314).

As stated, petitioner, on June 18, 1957, filed a bill for declaratory judgment in the Circuit Court of Montgomery

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[1] For instance, as pointed out, the effect of the April 23 order was to limit AAA's service in the new area to intra-town service between the towns therein. Thus service by AAA for the affected towns to and from urban areas was wholly eliminated. In lieu thereof the Commission substituted a service which AAA had not sought and the need and convenience for which was wholly without support in the evidence. The Commission on Jan. 7 had found that public convenience and necessity required the extensions sought by AAA, and it reiterated this finding in its April 23, order. Then it added a restriction the effect of which was to severely limit and cripple both these findings, for as pointed out by the lower court the service as restricted was in practical effect little service at all (R. 497).

The April 23 order also left AAA in a dilemma as to whether to serve Shorterville and a radius of eight miles therefrom, where construction of the Ft. Gaines Dam is under way. The only road to Shorterville and the dam site is from Abbeville, the nearest town, *which was a point served by AAA before its rights were extended*. Therefore, as best its counsel could tell AAA was restricted from hauling from anywhere to Shorterville or Shorterville to anywhere else (R. 497-498).

In addition, although the Commission twice had sent out notices to the parties describing the cause as "On Further Hearing" (R. 230, 234-235) it conducted the hearing on March 12 without hearing further evidence (R. 234).

County, Alabama (R. 2-8), alleging that the restriction imposed in the Order of April 23, 1957, was "unwarranted, unlawful, illegal, arbitrary" and "capricious" (R. 5), which, if enforced, would cause petitioner "irreparable injury and damage" (R. 6), and that there was existing "an actual controversy between the plaintiff and defendant on which substantial property rights are dependent" (R. 7). Petitioner sought from the said trial court a decree declaring that the limitation of April 23, 1957, was null and void and declaring that petitioner could operate over the highways as authorized by the Commissioner's order of January 7, 1957 (R. 7-8).

Forthwith after the said agreement was entered submitting the issues to the trial court (R. 314), the Commission filed its answer (R. 8-9) admitting all of the facts in the complaint to be substantially true and correct and denying that the limitation of April 23, 1957, was unlawful, illegal, arbitrary or capricious (R. 8-9). Certain carriers (including the named respondents in this petition) intervened in the declaratory judgment suit and adopted all of the allegations of the Commission's answer (R. 10-12, 13-15).

It is apparent, therefore, and it is an undisputed fact, that the only matter before the trial court was the validity and construction of the April 27, 1957, order.

The trial court conducted a hearing in open court, took additional evidence, and, on June 10, 1958, entered its order (R. 495-499, Appendix B) finding, inter alia, that the public convenience and necessity for service into the affected area was amply shown both by the evidence before the Commission on Jan. 7, 1957, and the independent testimony before the Court, that the Commission at all times had treated AAA's application as one for extension of existing rights and not for intra-town service, that the effect of the April 23 limitation was to limit AAA's service in the new

area to intra-town service between towns therein, which limitation AAA had not sought and the need of which was not supported by the evidence, that the public convenience and necessity requiring the service authorized by the order of January 7 was severely restricted by the limitation, and that the limitation of April 23 was contradictory and self-negating (R. 495-499, Appendix B).

The Court thereupon entered its decree declaring that the limitation of April 23, 1957, was arbitrary, illegal, null and void and was "upon construction so contradictory and self-negating that it is void and of no effect" (R. 498, Appendix B).

Again it is undisputed from the record that the only thing before the trial court was a construction of the April 23 order, which purportedly placed an ambiguous limitation, one difficult in compliance and unduly restrictive in scope, upon the former January 7 order.

Everyone—the commission, the intervenors and petitioner—was agreed that AAA had some rights of service into the new area. The question was, how much right?[2]

With the case thus decided by the trial court, the Commission and some of the intervenors (constituting the respondents herein) appealed to the Alabama Supreme Court (R. 500, 501). The respondents raised before that court two major points: (1) that the trial court was without jurisdiction since declaratory judgment was an improper remedy, and (2) that the April 23 order was not illegal or arbitrary or contradictory or self-negating, but that it was legal, valid and supported by the evidence, by judicial laws and statutes (R. 535-537, Assignment of Errors). Of

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[2] The trial court could have properly made three declarations: that the limitation was of no effect, so as to give AAA the right to "tack-on" the new area to its existing areas of service; that the limitation was prima facie valid so that AAA could only operate intra-town in the new area of service; that the limitation was valid as to some towns and areas, but not as to others.

course, petitioner supported the trial court's decree in all respects before the Alabama Supreme Court (R. 538).

Again, all the parties and the court were involved with the common endeavor of seeking a proper and correct answer to a judicial-administrative construction problem. All of the parties agreed that AAA had some right and the public had some right, supported by the public convenience and necessity, of service into the new area. The question was whether this service by AAA was to be unlimited or limited, and if limited, in what degree.[3]

On March 23, 1961, the Alabama Supreme Court entered its decision and judgment, with one Justice dissenting, stating in part (Appendix A):

> "An inspection of the orders of January 7 and April 23 shows, as we view it, an ambiguity on the face of the orders." 131 So. 2d at 178.
>
> ". . .
>
> "The January order and the April order are contradictory. The orders cannot coexist, the latter nullifies the former." At page 179.
>
> ". . .
>
> "We have undertaken to show that the trial court correctly found that the grant and the limitation placed on the grant are contradictory. The real question is whether the circuit court correctly set aside part of the order and left part of the order in effect." At page 179.
>
> ". . .
>
> "If the restriction here imposed in April be eliminated, the final order of the Commission will grant to AAA an unrestricted authority to operate between

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[3] The appeal presented the same questions to the Alabama Supreme Court as were presented to the trial court. See note 2, supra.

points authorized to be served prior to January. The Commission has not granted such unrestricted operating authority, and we cannot find from the order that the Commission intended to grant it. As a result, the April restriction cannot be rejected without causing the remainder of the order to grant authority the Commission never intended to grant. Consequently the entire order must fall." At pages 180, 181.

". . .

"In short, the January order gave and the April order took away operating authority. Consequently the orders have no effect. The Commission has power to grant operating authority, but the courts do not have that power, and, therefore, the courts cannot rewrite the orders so as to grant authority the Commission has not granted."

"The decree appealed from is affirmed in the holding that the orders of January and April taken together are ambiguous and void for uncertainty, but the decree is reversed as to the holding that AAA has the right to exercise the authority granted in the January order without restriction or limitation. It does not appear that any good purpose would or could be served by remanding the cause and a decree will be here rendered in accordance with this opinion."

This decision of the Alabama Supreme Court effectively took away from Petitioner and deprived the general public of all rights for petitioner to serve the new area, rights which had been thrice found supported by the public's convenience and necessity, even the limited right of intra-town service in the new area to which all parties agreed petitioner was entitled. This decision left petitioner and the public at large shipping inter-state goods with no remedy, no tribunal, and no procedure to protect their undisputed right of intra-town service, a service in which petitioner has continuously and rightfully engaged for

over four years, and a service to which no person or party had objected in this proceeding.

It is this act of the Alabama Supreme Court, done unexpectedly at the end of a long proceeding, upon which petitioner bases its writ.

There was no occasion or necessity or need to present the question of the unconstitutionality of the Alabama Supreme Court's decision to that Court. Petitioner raised questions of unconstitutionality of the decision at the earliest possible time in its "Petition for Stay of Mandate" to that Court on June 28, 1961 (R. 526, Appendix E). For "good cause shown" in said petition, that Court on the same date granted the stay of its mandate and allowed petitioner sixty days from the date denying petitioner's rehearing to "file its petition for a Writ of Certiorari in the Supreme Court of the United States for the purpose of reviewing the decision of this Court in this cause" (R. 528, Appendix F).

For authority supporting petitioner's timely presentment of the constitutional questions involved in this writ, we respectfully refer the Court to **Saunders v. Shaw**, 244 U. S. 317.

REASONS FOR GRANTING THE WRIT.

A cursory review of the many Federal cases holding acts by a state to be repugnant to the due process clause of the Fourteenth Amendment reveals that it is indeed an unusual thing for the act complained of to be the act of the highest tribunal of a state done in the process of rendering a judicial opinion. Nonetheless, as this Court recently observed through Mr. Justice Harlan in **National Asso. for the A. C. P. v. Alabama**, 357 U. S. 449, 463:

> "It is not of moment that the State has here acted solely through its judic[illegible] branch, for whether legis-

> lative or judicial, it is still the application of state power which we are asked to scrutinize."

And it is likewise of no moment whether the State judiciary effectively deprived petitioner of his procedure (**Saunders v. Shaw**, 244 U. S. 317; **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, 281 U. S. 673), or of his property (**Chicago, B. & O. R. Co. v. Chicago**, 166 U. S. 266) without due process of law.

Saunders v. Shaw, supra, 244 U. S. 317, is strikingly similar to this case. There the Louisiana Supreme Court by virtue of its opinion deprived plaintiff in error of procedural due process. The claim of due process was first made in the assignment of errors filed in the state court seeking Federal review. These assignments were filed shortly after that court had refused to consider an application for rehearing. Likewise, petitioner here first raised the claim of due process in the grounds of its petition for stay of mandate to the Alabama Supreme Court after that Court had refused to consider an application for rehearing.

Against the contention in **Saunders v. Shaw** that the writ of error could not be maintained because of untimely presentment of the constitutional questions, this Court through Mr. Justice Holmes held (244 U. S. at 320):

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional

rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done."

"Judgment reversed."

See, also, **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, supra, 281 U. S. 673, 677-8.

And, of course, this Court may examine the opinion of a state court in order to ascertain the patent unconstitutionality of its legal effect. **Kreiger v. Shelby R. R. Co.**, 125 U. S. 39, 45; **Chicago, B. & O. R. Co. v. Chicago**, supra, 166 U. S. at 232.

This case is simple in scope. Petitioner is a common carrier with rights based on the public convenience and necessity before January 7, 1957, to operate intra-state in "X" area. On that date it was given by the Commission rights based on public convenience and necessity to operate in "Y" area. On April 23, 1957, the Commission limited the rights granted in "Y" area. A dispute arose between petitioner on the one hand and the commission and intervening carriers on the other as to the quantum of service to be supplied by petitioner in "Y" area. The issue was presented to the state trial court and the parties agreed to an adjudication by that court of the issue of quantum of service into "Y" area.

At no time was there dispute as to whether petitioner had rights—the question was the quantum or amount of rights. The trial court ruled favorably to petitioner. The respondents appealed. The state court held, in effect, that because the quantum of rights into "Y" area was vague or ambiguous, petitioner therefore had **no** rights of service into the area. The decision was in the teeth of the facts that (1) petitioner had operated in "Y" area in both a limited and unlimited manner continuously for over four years, (2) that the public convenience and necessity demanded some operation; (3) that the only dispute was the quantum of operation, and (4) that no party had denied the fact of some rights into the area.

By virtue of the opinion, petitioner lost its undisputed limited rights of operation and lost any and all procedures and tribunals theretofore available to it for preservation of its limited rights.

Petitioner contends that this action by the Supreme Court of Alabama—

—deprived it of procedural due process in violation of the Fourteenth Amendment.

—deprived it of substantial property rights guaranteed by the 14th amendment.

—deprived the public at large its rights of limited service into the affected area in violation of the 14th amendment.

—was unconstitutional as an undue restraint on commerce in violation of Article 1, Section 8, Clause 3 of the Constitution.

(a) **Procedural Due Process.**

The express effect of the Court's action in rendering the issue before it (rather than affirming, remanding or modifying the lower decree) was to **void** not only the dis-

puted right of unlimited service but also **the undisputed right of limited service.**

The course of action which the Court could have taken most unfavorably to petitioner (within the contemplation of reasonable men) was to hold the April 23rd limitation valid in toto. Even with this decision petitioner would have retained its limited rights of service.

In that event the procedure then open to petitioner would be to apply to the Commission for an amendment or change of its March 23 order. **Smith Transfer Co. v. Robins Transfer Co.**, 253 Ala. 406, 63 So. 2d 351. And **petitioner could continue to operate with its then limited rights until the Commission ruled on its application for amendment.** The ruling could, if unfavorable, be appealed directly to a trial court, Title 48, Sec. 79, 301 (27), **Code of Alabama** (1940), as amended, or the Commission's ruling could be construed by declaratory judgment as in the case at bar.

In any and all events petitioner would have retained its limited rights of service and these rights would have been protected by the courts, statutes, and laws of Alabama.

Obviously, by the Court's decision petitioner lost **all** of its guaranteed procedural rights outlined above. It could seek no procedural review or amendment of the April 23 order because the order was void and non-existent. It could no longer engage in limited service. The only course of action open to it was to submit a new petition for amendment of its certificate and seek *de novo* some service into area "Y", and thus be forced to abstain from rendering any service into area "Y", until the Commission through its slow and creaking process[4] entered its order.

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[4] As stated earlier, the original petition for amendment in this case was filed on October 7, 1955. It was January 7, 1957 before the order was issued—a time lapse of 15 months.

Petitioner, therefore, was given no opportunity by the Alabama Court's decision to protect its rights into area "Y" because those rights were voided. This Court has censured such decisions:

> "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra, 281 U. S. 673, 682.

The actions of the Supreme Court of Alabama, therefore, amounted to a flagrant procedural due process violation. Such action by state supreme courts has been and should be often struck down by this court. **Saunders v. Shaw**, supra, 244 U. S. 317; **Brinkerhoff-Faris Trust & Sav. Co. v. Hill**, supra, 281 U. S. 673; **In re Frederick**, 149 U. S. 70. And particularly should this court carefully scrutinize such final state court decisions, for they come late in the game, with clandestine and devastating effect on the unsuspecting party.

(b) and (c) The Taking of Substantive Property Rights.

Petitioner has shown that the Alabama Supreme Court's decision voided all of its limited rights of service into the new area. This was no less that the taking of property by the state without compensation therefor. Not only were the rights of limited service cancelled or taken from petitioner, but the public at large, of whose convenience and necessity the rights were established, were deprived of all service by petitioner.

There is no doubt that such rights of service are valuable property rights under Alabama law and can only be withdrawn by judicial due process. This has been recognized by Alabama and other courts. **Alabama Public**

Service Com. v. So. Bell T. & T. Co., 253 Ala. 1, 42 So. 2d 655; **Lash v. State**, 244 Ala. 48, 14 So. 2d 229, answer to cert. q. conformed to 31 Ala. App. 121, 14 So. 2d 235. See also **Alabama Publ. Serv. Com. v. So. Ry. Co.**, 341 U. S. 341; **Louisville Ferry Co. v. Kentucky**, 188 U. S. 395; **State v. Board of R. R. Com'rs**, 131 Mont. 9, 306 P. 2d 264.

And the voidance of all of petitioner's service into the affected area involves not only the great economic loss to petitioner from having to completely withdraw from an area after long-continuous service, but the important factor of local need for the service rendered gives the public at large an important right in the matter. As this court observed in **Alabama Pub. Serv. Com. v. Southern R. Co.**, 341 U. S. 341, 346-7:

> "We do note that in passing upon similar contentions in the past, this Court has recognized that review of an order requiring performance of a particular utility service, even at a pecuniary loss, is subject to considerations quite different from those involved when the return on the entire intrastate operations of a utility is drawn into question. Atlantic Coast Line R. Co. v. North Carolina Corporation Commission, 1907, 206 U. S. 1, 24-27. The problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered. Chesapeake & Ohio R. Co. v. Public Service Commission of West Virginia, 1917, 242 U. S. 603, 608."

Under the Alabama Court's decision, both the petitioner and the public were deprived of the important property right of limited service into the affected area in violation of due process of law. See **Chicago, B. & O. R. Co. v. Chicago**, supra, 166 U. S. 266; **Ry. Comm. of Calif. v. Pacific G & E Co.**, 302 U. S. 388.

(d) **The Commerce Clause.**

We respectfully submit that where there has been a quasi-judicial and a judicial determination that the public convenience and necessity require service by a common carrier under a grant of intra-state right, and a majority of the goods carried by said carrier in the exercise of such rights are goods moving in interstate commerce, and a State Supreme Court without regard to the public convenience and necessity deprive the public at large of all service by a common carrier under such rights on the grounds that there is doubt as to the exact quantum or amount of service intended to be authorized, then the decision imposes an undue and unnecessary restriction and burden on commerce in violation of the "Commerce Clause" of the United States Constitution.

There is no statute, no police power and no administrative regulation involved. What is involved is a cessation of service of a common carrier into a particular area from which interstate goods are shipped, and the cessation was brought about in the face of the established fact that the public convenience and necessity demanded such service. The public, therefore, was deprived of the service which it enjoyed and needed. It could no longer ship its goods within or without the state with convenience. We submit that the decision of the Alabama Supreme Court under the circumstances at bar created an effective and unnecessary burden on commerce between the several states in violation of Article 1, Section 8, Clause 3, of the United States Constitution.

CONCLUSION.

The Alabama Supreme Court failed to apply judicial due process standards in its opinion and judgment rendered in this case below. By virtue of this failure petitioner has been deprived of both its property and all procedure for

protection of its property. The public at large has been deprived of a valuable property right as a result of the said decision, and the decision unduly interfered with commerce between the states.

Without a reversal of the decision by this Honorable Court, petitioner will be done a grave unconstitutional injustice by an arm of the State of Alabama and will be left without remedy or right.

TRUMAN HOBBS,

JOHN C. GODBOLD,

EUEL A. SCREWS, JR.,
Counsel for Petitioner.

Certificate of Service.

I hereby certify that I have served a copy of the foregoing petition for certiorari upon the Hon. MacDonald Gallion, Attorney General of the State of Alabama, one of the attorneys for the Alabama Public Service Commission, and on Maurice F. Bishop, Jr., Attorney for P. C. White Truck Lines, Inc., a corporation, and James R. Caton, d b/a Caton Transfer Company, by depositing the same in a United States Post Office with first-class postage prepaid addressed respectively to Hon. MacDonald Gallion, Judicial Building, Dexter Avenue, Montgomery, Alabama, and Maurice F. Bishop, Jr., Esquire, Frank Nelson Building, Birmingham, Alabama, this the ..... day of August, 1961.

Euel A. Screws, Jr.,
Attorney for Petitioner.

APPENDIX A.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

October Term, 1960-61.

3 Div. 845

Alabama Public Service Commission, et al.

v.

AAA Motor Lines, Inc.

Appeal from Montgomery Circuit Court, in Equity.

Coleman, Justice.

Motion to Dismiss.

The appellee has filed "Motion to Strike Transcript and Dismiss Appeal." This motion, as argued by appellee, appears to rest on two propositions.

First, appellee insists that the transcript must be stricken because the transcript of evidence was not filed in the office of the register by the court reporter within sixty days from the date on which the appeal was taken as provided by Act No. 97, Acts of 1956, page 143, which appears in Pocket Parts, Code 1940, as Title 7, § 827 (1). As we understand appellee's reply brief in support of the motion, appellee concedes, and we think correctly, that filing the transcript of evidence by the court reporter in equity cases is not governed by Act No. 97, supra, but is governed by § 769, Title 7, Code 1940, and Rule 37 of the Revised Rules of Practice in the Supreme Court as amended February 17, 1956, Appendix to Title 7, Code

1940. **Smith v. Bank of Blountsville**, 262 Ala. 65, 77 So. 2d 357.

This court has said that no time was fixed in Equity Rule 57 prior to amendment in 1945, as to when the testimony must be "written out and filed in the cause" in order to dispense with the note of testimony. **White v. White**, 246 Ala. 507, 21 So. 2d 436. Neither § 769, Title 7, nor Supreme Court Rule 37 sets a time within which the court reporter must file the transcript of evidence in the office of the register on an appeal in an equity case. Provision is made by Rule 37 and § 769, supra, as to time for filing the entire transcript in this court on an appeal in equity. It is obvious that the transcript of evidence cannot be inserted in the record and filed in the Supreme Court by the register until it has first been filed in his office by the court reporter. If any requirement as to time of filing is to be placed on the reporter, amendment of rule or statute would appear to be necessary.

Second, appellee insists that the transcript (we understand the entire transcript filed here) must be stricken because it was not filed in the office of the Clerk of the Supreme Court within sixty days of the taking of the appeal.

Appeal was taken July 1, 1958. On August 22, 1958, the trial judge made an order extending for thirty days the time for filing the record in the Supreme Court. The record was filed here September 29, 1958, which was the last day of the extended time. Supreme Court Rule 37 recites in pertinent part:

> ". . . The trial judge may extend the time for filing transcript of the record in this court for good cause shown for not to exceed thirty days, and this extension may be made within the thirty additional days, provided that in no event shall such extension project

the time for filing the transcript beyond ninety days. Thereafter the time for filing in this court may be extended only by this court for good cause shown upon petition in writing of which adversary counsel must have ten days' notice. . . . " (263 Ala. XXI.)

The order of August 22, 1958, recites:

"On motion of the Register, requesting additional time in which to prepare and file the Transcript of Appeal in the above styled cause, it is,

"Ordered by the Court That the time for filing the Transcript of Appeal in the Supreme Court of Alabama, be, and hereby is extended for thirty days from the date said transcript is due to be filed in said Supreme Court."

Appellee argues that the order of the trial judge made August 22, 1958, is invalid because the record fails to show: (1) an application in writing for extension, (2) that appellee had notice, or (3) good cause for granting the extension.

(1) Rule 37 expressly provides for a "petition in writing" when application is made to the Supreme Court for extension, but the rule does not so provide when such application is made to the "trial judge." If it had been intended to require a petition in writing to the trial judge, the rule could, and presumably would, have so provided. The expression of one thing is the exclusion of another. Because the rule expressly requires a written petition in one instance and omits that requirement in the other instance, we are of opinion that Rule 37 does not require a petition in writing where application for extension is made to the trial judge.

(2) Likewise, the rule expressly provides that "adversary counsel must have ten days' notice" when the appli-

cation for extension is made to "this court," but omits the requirement of notice to the adversary when the application is made to the "trial judge." Consequently, we are of opinion that Rule 37 does not require notice to the opposing counsel where application for extension is made to the trial judge.

(3) Rule 37 provides that the trial judge may extend the time "for good cause shown." As already stated, the rule does not require a written petition or notice to adversary counsel when application for extension is made to the trial judge. The rule does require a written order of the trial judge extending the time. The rule does not, however, require the order to state the "good cause" on which the order is based.

In **Harbin v. O'Rear**, 264 Ala. 190, 86 So. 2d 279, cited by appellee, the application considered was that made to this court, not to the trial judge. Rule 37 provides that "this court for good cause shown upon petition in writing" may grant extension of time. The rule does not require that the good cause shown to the trial judge must appear in the record. In **Harbin v. O'Rear**, supra, the rule applied was the requirement that good cause must be shown in the petition to this court, and for failure so to show good cause the extension was denied and the appeal was dismissed. That rule does not apply here where we are considering the application to the trial judge.

It is established that error will not be presumed. In the absence of a contrary showing, the presumption on review is that the trial court acted in accordance with the law. **Crossley v. Davies**, 253 Ala. 275, 44 So. 2d 439. In the absence of a showing that the action of the trial judge in extending the time was arbitrary or capricious, we will presume that good cause was shown for his granting of the extension. Because a valid extension was granted by

the trial judge, the record was timely filed in this court and the motion to dismiss the appeal is due to be and is denied.

On the Merits.

This is an appeal by respondents from a decree of the circuit court declaring void an order of the Alabama Public Service Commission. The complainant is a common carrier by motor vehicle operating under certificate issued by the Commission. The Commission is the respondent named in the bill. Competing carriers intervened in the declaratory proceedings and are appellants also.

On June 18, 1957, complainant, herein sometimes referred to as AAA, filed its bill of complaint. The bill avers that prior to January 7, 1957, AAA held Certificate No. 936, issued by the Commission, authorizing AAA to transport general commodities as a common carrier between Birmingham and Dothan via U. S. Highway 231, and to serve all intermediate points, and, in addition thereto, to render service between (1) Dothan and Slocomb, (2) Dothan and Enterprise, and (3) Dothan and Abbeville; and that prior to and on January 7, 1957, AAA was authorized to transport and did transport commodities to, from, and between all points lying between all points heretofore mentioned. On petition of AAA, and after hearing, the Commission, on January 7, 1957, amended Certificate No. 936 by an order which recites in pertinent part as follows:

> " 'It is hereby found as follows:
>
> " 'That the present and future public convenience and necessity require the service hereinafter authorized and that applicant is fit, willing and able to properly perform such service and to conform with the provisions of the Alabama Motor Carrier Act of 1939

and the requirements, rules and regulations of the Commission thereunder; . . .

" 'That an amendment to applicant's certificate of public convenience and necessity should be issued granting the authority sought in this cause to the extent hereinafter set forth; . . .

" 'It Is Therefore Ordered by the Commission, That Certificate of Public Convenience and Necessity No. 936 be, and the same is hereby, amended to include in addition to the authority now contained therein authority to operate as a common carrier of general commodities, except liquid commodities in bulk, in tank trucks, over regular routes as follows:

" 'Commencing at Slocomb, Alabama, on Alabama Highway No. 12, thence over Alabama Highway No. 12 via Hartford, Geneva, Samson and Opp to Andalusia; thence to Florala via Alabama Highway No. 55; thence Opp over U. S. Highway No. 84 to Elba; thence Elba over U. S. Highway No. 84 to Enterprise; thence Elba, Alabama, over Highway 15 to Troy, Alabama; also from Florala, Alabama, over Alabama Highway 54 to the intersection of Highway 12 about 3 miles northwest of Samson, Alabama; serving off-route points Shorterville and radius of eight miles, including Dam site in Alabama, over Alabama Highway No. 10.

" ' . . . ' "

On a petition for reconsideration of the order of January 7, 1957, the Commission, on April 23, 1957, made an order finding as follows, to-wit:

"The Commission has considered all of the testimony of record and the argument of counsel thereon and finds as follows:

" '1. That the present and future public convenience and necessity require the service author-

ized by the original order in this cause issued January 7, 1957, and that the applicant is fit, willing and able to properly perform such service and to conform with the provisions of the Alabama Motor Carrier Act of 1939 and the requirements, rules and regulations of the Commission thereunder, subject however, to the following terms, conditions and limitations in the exercise of the privilege granted herein and by the original order dated January 7, 1957, to-wit:

"'The authority contained in said order of January 7, 1957, may not be used in combination with the authority contained in Certificate No. 936 prior to January 7, 1957, in performing service between points theretofore authorized to be served in said Certificate No. 936, on the one hand, and those authorized to be served by the said order of January 7, 1957, on the other hand.

"' . . . .'"

The April order further provided that the order of January 7, 1957, be amended "so there shall be attached to the exercise of the privilege granted thereby the" limitation above set out in the finding of April 23, 1957; and further provided "That except as herein provided the said order of January 7, 1957, shall remain as entered." The parties appear to agree that the aforesaid averments are true.

The bill avers that there is "subsisting an actual controversy between" the parties and prays for a declaration that the restriction contained in the order of April 23, 1957, is null and void, and that AAA is authorized under its amended certificate to transport commodities between the points named in the certificate prior to January 7, 1957, and in addition thereto to the points described in the order of January 7, 1957.

The answer of Commission and intervenors, as last amended May 19, 1958, avers that the order of April 23, 1957, was duly promulgated on rehearing as provided by statute, Title 48, § 301, et seq., Code 1940 (Pocket Parts), and denies that the order of April 23, 1957, is unreasonable, unlawful, or arbitrary in any respect. The answer denies the existence of an actual controversy, and avers further that during the pendency of the declaratory suit, AAA has filed with the Commission an application seeking general authority over routes between the same points with removal of the limitations in the order of April 23, 1957. The answer prays that the bill be dismissed and denied.

The circuit court granted the relief prayed for by AAA. The Commission and the intervenors have appealed. The decree appealed from was rendered, after hearing, on testimony heard ore tenus and documentary evidence submitted by the parties.

Appellants argue that the circuit court erred in assuming jurisdiction and rendering declaratory judgment where no appeal was taken from the order of April 23, 1957, as provided by the Act approved July 5, 1940, 1939 Acts, page 1087; Pocket Parts, Code 1940, Title 48, § 301 (27); which provides that appeals must be taken within thirty days after the date of the final order of the Commission. The instant bill was filed more than thirty days after the order of April 23, 1957. Appellants' argument is based on the rule that an action for declaratory judgment cannot be made a substitute for appeal. That rule has been declared to be the law by this court. **Mitchell v. Hammond**, 252 Ala. 81, 39 So. 2d 582; **Howle v. Alabama State Milk Control Board**, 265 Ala. 189, 90 So. 2d 752. If the rule were otherwise, a declaratory proceeding would lie to determine whether a prior declaratory proceeding was erroneous, and there would be no end to that kind of litigation. The purpose of a declaratory judgment is to

declare rights not theretofore determined and is not to determine rights previously adjudicated. **Back's Guardian v. Bardo**, 234 Ky. 211, 27 S. W. 2d 960; **Ferree v. Ferree**, 273 Ky. 238, 115 S. W. 2d 1055. The reasoning appears to be that when a controversy has once been adjudicated by a tribunal having jurisdiction of parties and subject matter, the controversy is no longer an actual one under the declaratory judgment act. 154 A. L. R. 743.

The circuit court in the instant case decided that declaratory relief was not barred because of any right of appeal from orders of the Commission, and we agree with that decision.

The relief here sought was not a review of the propriety of the order of the Commission as such propriety might be determined on an appeal. The question posed by the contentions of AAA is whether the order is reasonable or unreasonable. Expressed another way the question is whether the order of the Commission is ambiguous or unambiguous.

There is no contention that the order of April 23, 1957, is void because the Commission lacked jurisdiction of either parties or subject matter. The contention is that the restriction imposed by the matter added on April 23, 1957, is unreasonable. The trial court found the restriction to be "contradictory and self-negating." The decree recites:

> "The effect of the restriction imposed by the Commission's order of April 23 was to limit AAA's service in the new area to intra-town service between the town(s) therein, since AAA was restricted from operating to or from any point in the new area from or to any point it had rights to serve before the extension of January 7 was granted. Thus service by AAA for the affected towns to and from urban areas was wholly eliminated. In lieu thereof the Commission authorized a service which AAA had not sought and

the need and convenience of which was wholly unsupported by the evidence. The Commission did this without taking any additional evidence. The effect of the restriction was to nullify the finding of the Commission made in its order of January 7, and repeated in its order of April 23, that public convenience and necessity required the service authorized by the order of January 7, for the service as restricted was in practical effect no service at all.

"The Court also finds that it is necessary to construe the order of April 23. This order reiterated the finding of January 7 that public convenience and necessity required the extension of service, found the applicant ready, willing and able to render the service, then contained a finding (and an order based thereon) as to the restriction. The authority of the Commission under Code of 1940, Title 48, Section 301 (10), to place restrictions on certificates is limited by requirements that restrictions be reasonable and be required by public convenience and necessity. The finding in the order of April 23 as to a limitation is not in terms of public convenience and necessity at all, and in any case, it is obviously in conflict with the finding that the extension of service is required, since the limitation makes wholly illusory the service found to be required. For example, AAA's privilege to extend service to the Ft. Gaines Dam Area (Shorterville) is a non-existent since the only road to Shorterville is from Abbeville, the nearest town, which is a point served by AAA before its rights were extended, therefore AAA cannot haul from Abbeville to Shorterville. . . ."

An inspection of the orders of January 7 and April 23 shows, as we view it, an ambiguity on the face of the orders. For example, prior to January 7, by Certificate No. 936, AAA was authorized to transport commodities

between Dothan and Slocomb. Slocomb is thus a point "theretofore authorized to be served in said Certificate No. 936" prior to January 7, 1957. The order of January 7 amended the certificate to include "authority to operate . . . over regular routes as follows: Commencing at Slocomb . . . thence . . . via Hartford, Geneva, Samson and Opp to Andalusia; . . ." The order of April 23, however, imposed the limitation that "The authority . . . in said order of January 7, 1957, may not be used . . . in performing service between points theretofore authorized to be served in said Certificate No. 936 . . . and those authorized to be served by the said order of January 7, 1957 . . ." The order of January 7 authorizes service from Slocomb to Andalusia, but the restriction of April 23 forbids service from a point "theretofore authorized to be served," one of which is Slocomb, to a point "authorized to be served by the said order of January 7," one of which is Andalusia.

The same ambiguity appears with respect to Enterprise, Troy, and Abbeville. All three are points "theretofore authorized to be served." The January 7 order authorizes service: from Elba, a new point, to Enterprise; Elba to Troy; and to "off-route points of Shorterville and radius of eight miles . . . over Alabama Highway No. 10." The map placed in evidence shows only one road to Shorterville, also a new point, and that road runs from Abbeville. The April 23 limitation forbids service from points "theretofore authorized to be served," to the new points. Thus the January 7 order gives authority to transport from Enterprise, Troy, and Abbeville to new points, but the April 23 order takes away the authority conferred. The January order and the April order are contradictory. The orders cannot coexist, the latter nullifies the former.

This court has previously entertained appeals in declaratory proceedings to construe certificates issued by the

Commission. **Smith Transfer Co. v. Robins Transfer Co.**, 258 Ala. 406, 63 So. 2d 351; **Deaton Truck Line v. Birmingham-Tuscaloosa-Mobile Motor Freight Line**, 264 Ala. 345, 87 So. 2d 421; and has construed certificates in declaratory proceedings where injunctive relief was also sought, **Martin Truck Line v. Alabama Tank Lines**, 261 Ala. 163, 73 So. 2d 756. Appellants appear to concede that declaratory relief is available to construe the orders of the Commission here involved because their brief states:

> "... We do not take the position that a declaratory judgment action will not lie to construe an order of the Commission, but we take the firm position that an appeal cannot be taken under the guise of a declaratory judgment action, and the court cannot proceed in such a declaratory judgment action to amend a part of the order of the Commission."

Our review here, and the review in the circuit court in a declaratory proceeding, is not controlled by the principles which are applicable where there is an appeal from an order of the Commission, and the question here is simply one of construction of the orders. **Smith Transfer Co. v. Robins Transfer Co.**, supra.

We have undertaken to show that the trial court correctly found that the grant and the limitation placed on the grant are contradictory. The real question is whether the circuit court correctly set aside part of the order and left part of the order in effect.

We are of opinion that the January order and the April order together constitute one order of the Commission. After the January order was made, interested parties made application for reconsideration as provided by statute. As we understand the contentions of the parties, it is not controverted that the statute authorizing reconsideration was fully complied with in all respects. The final order of April embodies the order of January, as modified, and

is one order, analogous to the judgment or decree of a court on rehearing, or a legislative act as finally passed after reconsideration by a legislative body. This conclusion is supported by the statute authorizing reconsideration which recites in pertinent part as follows:

> ". . . If, after such reconsideration or rehearing, it shall appear that the original decision, order, or requirement is in any respect unjust, or unreasonable, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such reconsideration or rehearing shall be subject to the same provisions as an original decision, order or requirement, provided, however, it shall not be subject to any further application for reconsideration or rehearing by the Commission." Act No. 669, Acts of Alabama 1939, page 1064, approved July 5, 1940; § 301 (5), Title 48, Code 1940, Recompiled 1958.

The circuit court held the April order void and of no effect, and that AAA is authorized to transport as defined and described in the January order. As already stated, the order of the Commission is the April order and the January order taken together. So, the question is, can a court, in a declaratory proceeding, declare invalid merely a part of an order of the Commission, or must the court declare the entire order invalid.

In a declaratory proceeding to construe a decree of the Mobile Circuit Court rendered on appeal from an order of the Commission, this court held that a part of the decree of the Mobile court could be declared void without invalidating the whole decree; **Avery Freight Lines v. Persons,** 250 Ala. 40, 32 So. 2d 886; but this court also held in the same case that the Mobile court did not have power to decree that a carrier could operate on all roads in the State because such an adjudication was beyond the power of the court and was void. This court held further that the decree of the Mobile court, in effect, set aside the

order of the Commission and remanded the case to the Commission, although the decree did not provide for remandment.

So in the case at bar, if it were a statutory appeal from the Commission's order, the circuit court could not decree that AAA has authority to transport in accordance with the January order, but could merely remand to the Commission for further proceedings in accordance with the court's decree. Although declaratory proceedings are not controlled by the same principles which apply on statutory appeals to review an order of the Commission, we do not think that in a declaratory proceeding the court can declare that a carrier has an authority without limitation where the Commission has undertaken to limit the authority. We are of opinion that the limitation here is such that it negates the very authority granted, but we do not think the court can, by construing the order, grant an authority which the Commission has not granted.

In the exercise of its supervisory or executive powers over public utilities, the Commission possesses quasi-legislative powers, such as the granting of franchises. **Avery Freight Lines v. White**, 245 Ala. 618, 18 So. 2d 394. The orders here in question purport to grant a franchise and were made by the Commission in the exercise of quasi-legislative power. As such orders, they are subject in some respects to the rules of statutory construction. We are not unmindful of the rule that such orders are analogous to judgments in some aspects relating to interpretation. **Murray v. Service Transport**, 254 Ala. 683, 49 So. 2d 221. The rule of construction is that if the invalid section may be stricken from a legislative act, leaving a statute complete in itself, sensible and capable of being executed, the striking of the invalid section does not overthrow the entire act. **Hall v. Underwood**, 258 Ala. 392, 63 So. 2d 683. The rule also is, however, that if by striking out a void restrictive clause, the remainder of an act, by

reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent and the whole act would be affected and made void by the invalidity of such part; and, if a clause which violates the Constitution cannot be rejected without causing the act to enact what the legislature never intended the whole statute must fall. **Wilkinson v. Stiles**, 200 Ala. 279, 76 So. 45.

If the restriction here imposed in April be eliminated, the final order of the Commission will grant to AAA an unrestricted authority to operate between points authorized to be served prior to January and points named in the January order. The Commission has not granted such unrestricted operating authority, and we cannot find from the order that the Commission intended to grant it. As a result, the April restriction cannot be rejected without causing the remainder of the order to grant authority the Commission never intended to grant. Consequently the entire order must fall.

AAA appears to argue that the appeal provided for by statute does not afford adequate relief because on appeal "the courts are ousted from setting aside or vacating a part of a public service commission order." AAA argues that "such a principle is one of the basic reasons why an appeal offered no relief or remedy to plaintiff here." The authority of the court on such an appeal is stated in **Avery Freight Lines v. Persons**, supra. One thing the court can do on appeal is to remand the case to the Commission for further proceedings in conformity with the direction of the court. The court does not have that power in the instant declaratory proceedings. If, however, the court did not have such power on appeal, we do not understand how that lack of power on appeal would, in a declaratory proceeding, confer on the court power to grant operating authority which the Commission has not granted. In People v. Willcox, 196 N. Y. 212, 89

N. E. 459, cited by AAA, on review by certiorari of an order of the New York Public Service Commission, the court found that denial of a certificate was unjustified. The court did not, however, undertake to grant the certificate but directed the Commission to grant it. The review on certiorari appears to have been comparable to our statutory appeal and was not a declaratory proceeding. The cited case does not hold that a court in a declaratory proceeding can invalidate part of an order and leave part in effect where the result is to grant an operating authority which the Commission has not granted.

With exception not here applicable, no carrier can operate in intrastate commerce on the highways of this State unless the carrier first secures the proper certificate or permit, and that certificate or permit must be issued by the Public Service Commission. **Avery Freight Lines v. Persons**, supra.

The orders of the Commission are subject to construction by the courts, but it is to the Commission and not the courts that applications for changes in the **wording** and **meaning** of certificates should be addressed, **Deaton Truck Line v. Birmingham-Tuscaloosa-Mobile Motor Freight Line**, supra.

In short, the January order gave and the April order took away operating authority. Consequently the orders have no effect. The Commission has power to grant operating authority but the courts do not have that power, and, therefore, the courts cannot rewrite the orders so as to grant authority the Commission has not granted.

The decree appealed from is affirmed in the holding that the orders of January and April taken together are ambiguous and void for uncertainty, but the decree is reversed as to the holding that AAA has the right to exercise the authority granted in the January order without restriction or limitation. It does not appear that any

good purpose would or could be served by remanding the cause and a decree will be here rendered in accordance with this opinion.

Affirmed in part and in part reversed and rendered.

Livingston, C. J., and Simpson, Stakely, and Goodwyn, JJ., concur.

Merrill, J., would affirm the decree of the lower court and, therefore, dissents.

The State of Alabama—Judicial Department.

The Supreme Court of Alabama.

3rd Div., No. 845.

Alabama Public Service Commission:

P. C. White Truck Line, Incorporated, et al.,
Appellant,

vs.

AAA Motor Lines, Inc.,
Appellee,

From Montgomery Circuit Court.

In Equity.

The State of Alabama,
City and County of Montgomery,

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to twenty-one, inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, this the 23rd day of March, 1961.

J. Render Thomas,
Clerk of the Supreme Court of Alabama.

APPENDIX B.

In the
Circuit Court of Montgomery County, Alabama.

AAA Motor Lines, Inc.,
Plaintiff,

v.

Alabama Public Service Commission et al.,
Defendants.

In Equity
Case No. .....

This suit for a declaratory judgment is brought by AAA Motor Lines against the Alabama Public Service Commission. Various motor carriers intervened as parties defendant. The cause came on to be heard on the petition for declaratory judgment, the answers as amended of the defendant and the intervenors, and oral testimony given in open court of numerous witnesses and the exhibits thereto.

Findings of Fact and Conclusions of Law.

AAA, a common carrier of general commodities, operated under Certificate 936 of the Alabama Public Service Commission along routes extending from Birmingham on the north, through Montgomery and Troy to an area which may be described generally as that of Eufaula, Abbeville, Dothan, Slocomb and Enterprise. It applied for an amendment of its certificate extending its rights so that its routes could serve a new area generally west of Dothan, including Hartford, Geneva, Andalusia, Opp, and several other towns, and the Ft. Gaines Dam area (Shorterville), generally east of Abbeville.

After a lengthy public hearing, a transcript of which was introduced into evidence before the court, the Commission entered an order on January 7, 1957, finding "that the present and future public convenience and necessity require the service hereinafter authorized." It ordered that AAA's certificate be "amended to include in addition to the authority now contained therein authority to operate as a common carrier of general commodities . . . over regular routes as follows:", and the extensions asked by AAA were then set out in detail in the order.

A petition for rehearing was filed by certain of the carriers who have intervened in this cause, and on April 23, 1957, the Commission, without hearing any further testimony or taking any further evidence, found "That the present and future public convenience and necessity require the service authorized by the original order in this cause issued January 7, 1957," and then ordered that the authority contained in said order of January 7 could not be used in combination with the authority contained in AAA's certificate prior to said order, in performing service between points theretofore authorized to be served, on the one hand, and those authorized to be served by the order of January 7, on the other hand.

Immediately after the order of January 7 was entered AAA commenced to render service over its routes as extended by said order. There was a large demand for AAA's service between the newly served area and urban centers, and the service rendered was satisfactory. There arose a dispute between the Commission and counsel for AAA as to the validity of the limitation imposed on April 23 (and a prior order which stayed the order of January 7). On the advice of its counsel that the same were illegal, AAA continued to render the extended service for several months during which time its counsel carried on negotiations with the Commission. Eventually AAA ceased giving

service on the extensions of its routes, this after a notice from the Commission threatening it with penalties and a citation from the Commission to show cause why all its operating authority should not be revoked.

AAA contends before the court that the restriction imposed by the order of April 23 is unreasonable, arbitrary, capricious, and void. It prays that this restriction be declared null and void and that AAA be authorized to operate in the manner provided by its certificate as extended by the order of January 7, 1957.

The court finds that this is a proper case for declaratory judgment, that the availability of declaratory judgment is not here barred because of any right of appeal from orders of the Commission, and that there now exists a justiciable controversy between the parties.

Under Code of 1940, Title 48, Section 301 (10), the Commission may attach to the exercise of a privilege granted by its certificate such reasonable terms, conditions and limitations as the public convenience and necessity may require, including terms, conditions and limitations as to the extension of the route or routes of the carrier. Based on all the legal, competent, and material evidence before the Court, it appears, and the Court so finds, that the limitation imposed by the order of April 23 is unreasonable, arbitrary and illegal. However, the Court reaches the same conclusion based solely on the record of all the proceedings of the Commission in Docket No. 14027.

The Commission by its order of January 7 found that the public convenience and necessity required that the towns in the area west of Dothan be served by extension of the routes of AAA.

Based solely on the transcript of the proceedings before the Commission in Docket No. 14027, and without regard to the evidence at the trial, the Court is in accord with

the Commission that on January 7, 1957, the present and future public convenience and necessity required that the requested extension of rights be granted, and that AAA was fit, willing and able to properly perform such service and to conform with the Motor Carrier Act of 1939 and the requirements, rules and regulations thereunder, and the Court so finds.

The Court received additional evidence of public convenience and necessity prior to January 7, 1957, and for the period from said date to March 11 or 12, 1957, when the application for rehearing was submitted, and for the period from March 12, 1957, to date, all of which substantiates the findings of public convenience and necessity reached by the Commission and the Court based on the transcript alone. The public need for service in the area west of Dothan was not being met by other carriers when the Commission held its public hearing, nor when it issued its orders of January 7 and April 23, and is not being met now (in fact, there is considerably less service now than when the Commission held its hearing). Neither before the Commission nor in this Court were any substantial grounds shown for denying to users the service needed or limiting it as it was limited.

The examination of the transcript of the hearing before the Commission makes it clear that at all times the Commission treated the application of AAA as one for extension of its existing rights and that all parties and witnesses were concerned with traffic into the newly-served area from Dothan, Montgomery, Birmingham and other urban centers and out of the area to such centers. It is plain that no one had in mind or considered of any importance the nominal, or non-existent, need for intra-town service between the several small towns in the new area.

The effect of the restriction imposed by the Commission's order of April 23 was to limit AAA's service in the

new area to intra-town service between the towns therein, since AAA was restricted from operating to or from any point in the new area from or to any point it had rights to serve before the extension of January 7 was granted. Thus service by AAA for the affected towns to and from urban areas was wholly eliminated. In lieu thereof the Commission authorized a service which AAA had not sought and the need and convenience of which was wholly unsupported by the evidence. The Commission did this without taking any additional evidence. The effect of the restriction was to nullify the finding of the Commission made in its order of January 7, and repeated in its order of April 23, that public convenience and necessity required the service authorized by the order of January 7, for the service as restricted was in practical effect no service at all.

The Court also finds that it is necessary to construe the order of April 23. This order reiterated the finding of January 7 that public convenience and necessity required the extension of service, found the applicant ready, willing and able to render the service, then contained a finding (and an order based thereon) as to the restriction. The authority of the Commission under Code of 1940, Title 48, Section 301 (10), to place restrictions on certificates is limited by requirements that restrictions be reasonable and be required by public convenience and necessity. The finding in the order of April 23 as to a limitation is not in terms of public convenience and necessity at all, and in any case, it is obviously in conflict with the finding that the extension of service is required, since the limitation makes wholly illusory the service found to be required. For example, AAA's privilege to extend service to the Ft. Gaines Dam Area (Shorterville) is nonexistent since the only road to Shorterville is from Abbeville, the nearest town, which is a point served by AAA before its rights were extended, therefore AAA cannot haul from Abbeville to Shorterville. The Court finds

that the order of April 23 is so contradictory and self-negating that it can have no effect and is therefore to be treated as void.

The Court having considered only the relevant, competent, material and legal testimony, it is, therefore,

Ordered, Adjudged, Decreed and Declared as follows:

1. The allegations of the petition for a declaratory judgment are true and the plaintiff is entitled to the relief therein prayed for.

2. The restriction contained in the order of the Alabama Public Service Commission dated April 23, 1957, Docket No. 14027, as follows:

> "The authority contained in said order of January 7, 1957, may not be used in combination with the authority contained in Certificate No. 936 prior to January 7, 1957, in performing service between points theretofore authorized to be served in said Certificate No. 936 on the one hand, and those authorized to be served by the said order of January 7, 1957, on the other hand.
>
> "It Is Further Ordered by the Commission, That the said AAA Motor Lines, Inc., shall abstain from operating as a motor carrier in Alabama except in accordance with the limitations, conditions and restrictions set forth in the next preceding paragraph hereof, and that if the said AAA Motor Lines, Inc., is now operating contrary to said restrictions, limitations, and conditions, that it is hereby directed, required and ordered to cease and desist from so operating."

is unreasonable and arbitrary and illegal and is null and void and is not binding in any respect on AAA Motor Lines.

3. The order of the said Commission dated April 23, 1957, is upon construction so contradictory and self-negating that it is void and of no effect.

4. AAA Motor Lines is authorized under its certificate (No. 936), as amended, to transport general commodities as a common carrier over regular routes and between points and places named in said Certificate No. 936 and in addition thereto to the points and places and over the highways as defined and described in the order of the said Commission dated January 7, 1957.

The costs are taxed against the defendant for which let execution issue.

Done, this the 10th day of June, 1958.

/s/ Walter B. Jones,
Circuit Judge, Presiding.

APPENDIX C.

"AAA Motor Lines, Inc., Applicant. } Docket No. 14,027. Certificate No. 936.

Order of the Commission.

"This cause coming on to be heard before the Alabama Public Service Commission and the parties, after due notice, having appeared and submitted their testimony and the Commission having given full consideration to the application herein and to the entire record in this proceeding; . . .

"It is hereby found as follows:

"That the present and future public convenience and necessity require the service hereinafter authorized and that applicant is fit, willing and able to properly perform such service and to conform with the provisions of the Alabama Motor Carrier Act of 1939 and the requirements, rules and regulations of the Commission thereunder; . . .

"That an amendment to applicant's certificate of public convenience and necessity should be issued granting the authority sought in this cause to the extent hereinafter set forth; . . .

"It Is Therefore Ordered by the Commission, That Certificate of Public Convenience and Necessity No. 936 be, and the same is hereby, amended to include in addition to the authority now contained therein authority to operate as a common carrier of general commodities, except liquid commodities in bulk, in tank trucks, over regular routes as follows:

"Commencing at Slocomb, Alabama, on Alabama Highway No. 12, thence over Alabama Highway No. 12 via Hartford, Geneva, Samson and Opp to Andalusia; thence

to Florala via Alabama Highway No. 55; thence Florala to Opp over Alabama Highway No. 15; thence Opp over U. S. Highway No. 84 to Elba; thence Elba over U. S. Highway No. 84 to Enterprise; thence Elba, Alabama, over Highway 15 to Troy, Alabama; also from Florala, Alabama, over Alabama Highway 54 to the intersection of Highway 12 about 3 miles northwest of Samson, Alabama; serving off-route points of Shorterville and radius of 8 miles, including Dam site in Alabama, over Alabama Highway No. 10.

"It Is Further Ordered by the Commission, That the operations herein authorized shall be subject to all the rights, privileges and immunities, as well as all the restrictions, liabilities and responsibilities that are now or may hereafter be imposed by law or the rules and regulations of the Commission upon common carriers by motor vehicle.

"It is Further Ordered by the Commission, That this order be effective as of the date hereof.

"Dated at Montgomery, Alabama, this the 7th day of January, 1957.

Alabama Public Service Commission,

/s/ C. C. (Jack) Owen,
C. C. (Jack) Owen,
President,

/s/ Jimmy Hitchcock,
Jimmy Hitchcock,
Associate Commissioner,

/s/ Sibyl Pool,
Sibyl Pool,
Associate Commissioner.

Attest: A True Copy.

/s/ Orville P. Large,
Orville P. Large,
Secretary."

APPENDIX D.

"AAA Motor Lines, Inc., Applicant. } Docket No. 14027.

Report and Order of the Commission Upon Reconsideration and Rehearing.

"On January 7, 1957, an order was issued in this cause, after hearing, amending Motor Carrier Certificate of Public Convenience and Necessity No. 936 so as to add to the authority theretofore contained in said certificate, authority to operate as a common carrier of general commodities, except liquid commodities in bulk, in tank trucks, over regular routes as follows:

"Commencing at Slocomb, Alabama, on Alabama Highway No. 12, thence over Alabama Highway No. 12 via Hartford, Geneva, Samson and Opp to Andalusia; thence to Florala via Alabama Highway No. 55; thence Florala to Opp over Alabama Highway No. 15; thence Opp over U. S. Highway No. 84 to Elba; thence Elba over U. S. Highway No. 84 to Enterprise; thence Elba, Alabama, over Alabama Highway 15 to Troy, Alabama; also from Florala, Alabama, over Alabama Highway 54 to the intersection of Highway 12 about 3 miles northwest of Samson, Alabama; serving off-route points of Shorterville and radius of eight miles, including Dam site in Alabama, over Alabama Highway No. 10.

"Under date of January 14, 1957, James R. Caton, d b a Caton Transfer Company, Maxwell Truck Line, Inc. (P. C. White Truck Line, Inc.), and Avery Freight Line filed with the Commission a petition for reconsideration or rehearing, answer to which was filed by the Applicant in these proceedings on February 4, 1957. Under date of March 12, 1957, oral argument was held on the motion and petition for further reconsideration or rehearing and the matter is now before the Commission for final consideration.

"The Commission has considered all of the testimony of record and the argument of counsel thereon and finds as follows:

"1. That the present and future public convenience and necessity require the service authorized by the original order in this cause issued January 7, 1957, and that the applicant is fit, willing and able to properly perform such service and to conform with the provisions of the Alabama Motor Carrier Act of 1939 and the requirements, rules and regulations of the Commission thereunder, subject however, to the following terms, conditions and limitations in the exercise of the privilege granted herein and by the original order dated January 7, 1957, to wit:

"The authority contained in said order of January 7, 1957, may not be used in combination with the authority contained in Certificate No. 936 prior to January 7, 1957, in performing service between points theretofore authorized to be served in said Certificate No. 936, on the one hand, and those authorized to be served by the said order of January 7, 1957, on the other hand.

"2. That in exercise of the privilege granted by the said order of January 7, 1957, the said AAA Motor Lines, Inc., shall abstain from operating except in accordance with this order and the restrictions contained therein and if operations are now being conducted contrary to such restrictions the said AAA Motor Lines, Inc., should be required to cease and desist from so operating.

"It Is Therefore Ordered by the Commission, That the original order in this cause dated January 7, 1957, be, and the same is hereby, amended so there shall be attached to the exercise of the privilege granted thereby the following reasonable terms, conditions, and limitations:

"The authority contained in said order of January 7, 1957, may not be used in combination with the authority contained in Certificate No. 936 prior to January 7, 1957, in performing service between points theretofore authorized to be served in said Certificate No. 936 on the one hand, and those authorized to be served by the said order of January 7, 1957, on the other hand.

"It Is Further Ordered by the Commission, That the said AAA Motor Lines, Inc., shall abstain from operating as a motor carrier in Alabama except in accordance with the limitations, conditions, and restrictions set forth in the next preceding paragraph hereof, and that if the said AAA Motor Lines, Inc., is now operating contrary to said restrictions, limitations, and conditions, that it is hereby directed, required and ordered to cease and desist from so operating.

"It Is Further Ordered by the Commission, That except as herein provided the said order of January 7, 1957, shall remain as entered.

"It Is Further Ordered by the Commission, That this order shall be effective as of April 26, 1957.

"Dated at Montgomery, Alabama, on this the 23rd day of April, 1957.

Alabama Public Service Commission,

/s/ C. C. (Jack) Owen,
C. C. (Jack) Owen, President.

/s/ Jimmy Hitchcock,
Jimmy Hitchcock, Associate Commissioner,

/s/ Sibyl Pool,
Sibyl Pool, Associate Commissioner.

Attest: A True Copy:

/s/ Orville P. Large,
Orville P. Large, Secretary."

APPENDIX E.

In the Supreme Court of the State of Alabama.

3rd Division. No. 845.

Alabama Public Service Commission et al.,
Appellants (Respondents),

AAA Motor Lines, Inc., a Corporation,
Appellee (Petitioner).

Petition for Stay of Mandate.

Comes the Appellee, AAA Motor Lines, Inc., a corporation, and respectfully shows unto the Court that it is preparing for filing in the Supreme Court of the United States, a petition for Writ of Certiorari, which under the rules of the Supreme Court of the United States must be filed within 90 days from the date of the denial by This Honorable Court of the Application for Rehearing in this cause. The Appellee will assert in said petition for writ of Certiorari the following questions, among others:

1. Is it a violation of due process under the Fourteenth Amendment to the Constitution of the United States for a state court to deprive the public at large of all service by a common carrier found to be required by the public convenience and necessity on the ground that as a matter of construction there is doubt as to the exact quantum of service intended to be authorized?

2. Is it a violation of equal protection of the laws under the Constitution of the United States for a state court to deprive the public at large of all service by a common carrier found to be required by the public convenience and necessity on the ground that

as a matter of construction there is doubt as to the exact quantum of service intended to be authorized.

3. Where there has been a quasi-judicial and a judicial determination that the public convenience and necessity require service by a common carrier under grant of intrastate rights, and a majority of the goods carried by said carrier in the exercise of such rights are goods moving in interstate commerce, is it a violation of the Constitution of the United States for a state court to deprive the public at large of all services by the common carrier under such rights on the ground that there is doubt as to the exact quantum of service intended to be authorized?

4. Is the order of the Alabama Public Service Commission dated April 23, 1957, so unlawful, illegal, arbitrary and capricious that it violates the Fourteenth Amendment to the Constitution of the United States?

Wherefore, Appellee prays that this Honorable Court will enter an order staying the execution of the Mandate in this cause for a period of 90 days from the date of the denial of the Application for Rehearing, and if petition for Writ of Certiorari is filed during said period of time in the Supreme Court of the United States then for such further length of time as will be required for the Supreme Court of the United States to take action in said matter.

Also, Appellee shows unto the Court that the Alabama Public Service Commission is threatening to halt forthwith all operations of Appellee in the area concerned and prays that this Honorable Court, or any judge thereof, will enter forthwith and instanter a temporary order staying the execution of the Mandate until this Motion can be ruled on.

.....

Attorney for Appellee.

APPENDIX F.

In the Supreme Court of the State of Alabama.

3rd Division Number 845

Alabama Public Service Commission, et al.,
Appellants (Respondents),

AAA Motor Lines, Inc., a Corporation,
Appellee (Petitioner).

The application for rehearing filed by AAA Motor Lines, Inc., a corporation, appellee, having been overruled on June 22, 1961, and the said appellee having filed its petition for a stay of the Mandate in this cause, and for good cause shown, it is therefore.

Ordered by the Supreme Court of Alabama that the judgment in this cause be stayed for sixty (60) days from June 22, 1961, to and including the 21st day of August, 1961, in order that AAA Motor Lines, Inc., may file its petition for a Writ of Certiorari in the Supreme Court of the United States for the purpose of reviewing the decision of this Court in this cause.

It is further Ordered that in the event AAA Motor Lines, Inc., has filed its petition for Writ of Certiorari in the Supreme Court of the United States within said time said Stay shall continue in full force and effect until the case is disposed of in said Supreme Court of the United States or until the further orders of this Court.

6/28/61 Livingston, C. J., Lawson, Stakely, Merrill and Coleman, JJ., concur.

I, J. Render Thomas, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court. Witness my hand this 28 day of June, 1961.

J. Render Thomas,
Clerk, Supreme Court of Alabama.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 338

AAA MOTOR LINES, INC., a Corporation,
Petitioner,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, P. C. WHITE TRUCK LINE, INC., a Corporation, and JAMES R. CATON, d/b a CATON TRANSFER COMPANY,
Respondents.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari.

McDONALD GALLION,
Attorney General,
State of Alabama.
J. TAYLOR HARDIN,
Assistant Attorney General,
State of Alabama.
WILLIAM F. BLACK,
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Birmingham, Alabama,
Attorneys for Respondents, P. C. White Truck Line, Inc., and Caton Transfer Company.

Due Date: September 21, 1961.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

INDEX.

	Page
Jurisdiction	1
Questions involved	2
Statutes involved	3
Statement of the case	4
Reasons for denying the writ	8
(a) The procedural questions	12
(b) No property rights of petitioner have been affected	13
(c) The Commerce Clause of the United States Constitution is not involved	16
Conclusion	17
Certificates of service	19

Cases Cited.

Deaton Truck Line, Inc. v. Birmingham-Tuscaloosa M. F. L., 264 Ala. 345, 87 So. 2d 421	5
Durley v. Mayo, 351 U. S. 277, cert. den. 352 U. S. 859	9, 11
Gulf Transport Co. v. Illinois Comm. Comm., 402 Ill. 11, 83 N. E. 2d 336	16
Harris v. State Corp. Comm., 129 P. 2d 323	15
Honeyman v. Hanan, 300 U. S. 14	10
Howle v. Ala. State Milk Control Board, 265 Ala. 189, 90 So. 2d 752	12
Illinois Commerce Comm. v. N. Y. Central Ry. Co., 398 Ill. 11, 75 N. E. 2d 411	15
Lynch v. New York, 293 U. S. 52	10

Mitchell v. Hammond, 252 Ala. 81, 39 So. 2d 582 12

National Assoc. for the A. C. P. v. Alabama, 357 U. S. 449 11

New York ex rel. Consolidated Motor Co. v. Maltbie, 303 U. S. 158 10

Railway Express Agency v. Public Serv. Comm., 237 Mo. App. 420, 169 S. W. 2d 88 15

Saunders v. Shaw, 244 U. S. 317 ..... 8, 10

Smith Transfer Co. v. Robins Transfer Co. et al., 253 Ala. 406, 63 So. 2d 351 12

State ex rel. Anderson v. Public Service Comm., 234 Mo. App. 470, 134 S. W. 1069 16

State ex rel. Interstate Transit Lines v. Public Service Comm., 237 Mo. App. 554, 132 S. W. 2d 1082 16

State ex rel. Mo. Pac. R. Co. v. P. S. C., 37 S. W. 2d 576 16

Transcontinental Bus System, Inc. v. State Corp. Comm., 56 N. M. 158, 241 P. 2d 829 14

Wilkinson v. Stiles, 200 Ala. 279, 76 So. 45 13

Statutes Cited.

Code of Alabama 1940:

Article 3, Chapter 3, Title 48 3

Title 48, §§ 79, 82, 83, 301 (5) 9, 301 (8) ..3, 4, 5, 9, 13, 17

Title 7, Appendix, Supreme Court Rule 34 4

Title 7, Sec. 157 9

28 U. S. C., § 1257 (3) 1, 11, 17

49 U. S. C., § 303 (e), 306 .....8, 16, 17

Texts Cited.

59 Corpus Juris, § 206, p. 646 14

1 Lewis, Southerland Statutory Construction (2nd Ed.), § 306, p. 597 13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. . .

AAA MOTOR LINES, INC., a Corporation,
Petitioner,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, P. C. WHITE TRUCK LINE, INC., a Corporation, and JAMES R. CATON, d b a CATON TRANSFER COMPANY,
Respondents.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari.

THIS CASE RAISES NO JURISDICTIONAL QUESTIONS REVIEWABLE UNDER 28 U. S. C., § 1257 (3).

As hereinafter noted, there is no right, privilege, or immunity here involved or claimed under the Constitution or Statutes of the United States which could conceivably confer jurisdiction under 28 U. S. C., § 1257 (3).

QUESTIONS INVOLVED.

At the outset it should be noted and remembered that no issue of or relating to interstate commerce is here involved. This action simply involves an application filed with the State Regulatory Commission by an intrastate motor carrier to extend its intrastate certificate and a judicial construction by the State Courts of the Order of the State Commission issued on that application. The basic questions involved are:

(1) Is a substantial federal question presented in a declaratory judgment proceeding instituted in the state courts to construe an order of the Alabama Public Service Commission?

(2) Will the Supreme Court of the United States undertake to review proceedings in the State Court which involve merely the construction of an order of the Alabama Public Service Commission involving an intrastate motor carrier certificate?

(3) Will the United States Supreme Court grant certiorari to review the decision of the Supreme Court of Alabama in a declaratory judgment proceeding to construe an order of the Alabama Public Service Commission, granting, in part, and denying, in part, an application for an intrastate certificate of public convenience and necessity?

(4) Will this court grant certiorari to review a decision of the Alabama Supreme Court where the petitioner had the right to and did file an application for rehearing to that court and did not raise or suggest in that application for rehearing the federal questions here sought to be presented for the first time in its petition for certiorari?

STATUTES INVOLVED

The statutes actually involved and determinative of this proceeding are the following:

Article 3, Chapter 3, Title 48, 1940 Code of Alabama, as amended (hereinafter at times referred to as "the motor carrier act") which grants to the Alabama Public Service Commission (hereinafter at times referred to as "the Commission" or "APSC") regulatory powers over intrastate motor carriers in Alabama, and in particular, Title 48, 301 (8), Alabama Code 1940, as amended, which provides in pertinent part that:

> "No common carrier by motor vehicle subject to the provisions of this act shall engage in intrastate commerce on any highway in this state unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this article, authorizing such operation."

Also, the provisions of Title 48, 301 (5) (9), Alabama Code 1940, as amended, which provides in pertinent part that:

> "After a decision, order, or requirement has been made by the Commission in any proceeding under this article any party thereto may make application to the Commission for reconsideration or rehearing of the same—Such application shall be filed within thirty days after the date of such decision, order, or requirement—If, after such reconsideration or rehearing, it shall appear that the original decision, order, or requirement is in any respect unjust, or unreasonable, the Commission may reverse, change, or modify the same accordingly."

And Rule 34 of the Alabama Supreme Court (Appendix, Title 7, Code of Alabama 1940) which provides in pertinent part that:

> "All applications for rehearing must be filed with the Clerk of the Court, accompanied by brief for the applicant and a certificate of counsel within 15 days after the rendition of the judgment . . ."

STATEMENT OF THE CASE.

The facts here involved are relatively simple. The petitioner AAA Motor Lines, Inc. (hereinafter at times referred to as "petitioner" or "AAA") filed an application with the APSC under § 8 of the Alabama Motor Carrier Act (Title 48, § 301 (8), Alabama Code of 1940, as amended) to extend its Alabama intrastate certificate to serve an area in South Alabama in the transportation of intrastate freight. The application was opposed by the respondent motor carriers and four other carriers already serving the territory and performing the service for which the new authority was sought. After hearing, the Commission entered its order of January 7, 1957 (Appendix C, Petitioner's Brief, pp. 45-46) and amending AAA's certificate:

> "to include, in addition to the authority now contained therein, authority to operate as a common carrier of general commodities over regular routes as follows . . ."

Admittedly within the time and in the form and manner provided by statute [Title 48, § 301 (5) (9), Alabama Code 1940, as amended] the protestant motor carriers filed an application to the Commission for reconsideration or rehearing of its order of January 7, 1957, to which AAA replied. After proper notice the application for reconsideration or rehearing was argued orally before the Commission and on April 23, 1957, the Commission issued its

"report and order upon reconsideration and rehearing" (Appendix D, petitioner's brief, pp. 47-49), which prohibited AAA from "tacking" the authority granted in its order of January 7, 1957, with authority previously held and thus providing a service never contemplated by the Commission and for which there was **no** testimony in the record.[1] It is important, and we respectfully submit controlling to note that no appeal was taken from the order of the APSC as is specifically authorized and provided in Title 48, §§ 79 and 301 (27), Alabama Code of 1940, as amended.

Long after the time for appeal had expired and on June 18, 1957, AAA filed a bill for declaratory judgment in the Circuit Court of Montgomery County, Alabama, alleging that the restriction incorporated in the April 23, 1957, order was "unwarranted, unlawful, illegal, arbitrary and capricious" and praying that the Circuit Court issue it an intrastate certificate of public convenience and necessity without limitation or restriction.

Apparently recognizing that the position it asserted in the Circuit Court was legally untenable, and while the petition for declaratory judgment was pending, AAA filed another separate application before the APSC seeking the identical rights involved in the original application.

Following hearing on the petition for declaratory judgment, the Circuit Court of Montgomery County proceeded to engage in legislative action and to issue to AAA a certificate of public convenience and necessity in an unprece-

---

[1] The Alabama Commission and the Alabama Supreme Court previously had occasion to consider the effect of "tacking" separate grants of unrestricted authority which frequently is prohibited by specific restriction and which is never legally permitted unless the essential transportation requirements are present. See *Deaton Truck Line, Inc., v. Birmingham-Tuscaloosa-M F L.*, 264 Ala. 345, 87 So. 2d 421.

dented, erroneous decision which far exceeded the imaginable bounds of a declaratory judgment proceeding (Petitioner's brief, Appendix B, pp. 38-44). Contrary to the argument of petitioner (Their brief, pp. 8-9) and as noted and held by the Alabama Supreme Court, the Montgomery County Circuit Court had before it for construction and determination both orders of the APSC—the original order of January 7, 1957, and the order on reconsideration of April 27, 1957. The Montgomery County Circuit Court held that "the present and future public convenience and necessity required that the requested extension of rights be granted."

The Commission and the motor carrier protestants appealed the decree of the Montgomery County Circuit Court to the Alabama Supreme Court (R. 500, 501), where all issues involved were exhaustively briefed and argued orally. Here again the petitioner is in error in stating or suggesting that "all the parties agreed that AAA had some right". The protestant motor carriers have never conceded that there was one word of testimony in the record which would authorize any grant of authority to the petitioner. In its decision (Appendix A, Petitioner's brief, pp. 21-37) the Alabama Supreme Court noted that "the question here is simply one of construction of the orders" and that "the real question is whether the Circuit Court correctly set aside part of the order and left part of the order in effect". The Alabama Supreme Court concluded and held that (Petitioner's brief, p. 35):

> "If the restriction here imposed in April be eliminated, the final order of the Commission will grant to AAA an unrestricted authority to operate between points authorized to be served prior to January and points named in the January order. The Commission has not granted such unrestricted operating authority, and we cannot find from the order that the Commis-

> sion intended to grant it. As a result, the April restriction cannot be rejected without causing the remainder of the order to grant authority the Commission never intended to grant. Consequently the entire order must fall."

Following the decision of the Alabama Supreme Court on March 23, 1961, and pursuant to Rule 34, AAA filed an application with the Alabama Supreme Court for rehearing or reconsideration of its decision. The petition did not raise or suggest to the Alabama Supreme Court the constitutional or federal questions here sought to be presented to this Court for the first time, although the Petitioner had the opportunity to do so in its application for rehearing, if, in fact, any such questions existed. The petitioner's application for rehearing was denied by the Alabama Supreme Court on June 2, 1961.

Again, it should be noted that the Petitioner had the right to but did not appeal the order of the APSC. Instead, it filed a petition for declaratory judgment in the Circuit Court seeking a judicial construction of the orders of the APSC. The Alabama Supreme Court exercised the only jurisdiction invoked by the Petitioner, i. e., it proceeded to a construction of the orders of the APSC involved.

Petitioner's repeated argument that "the only thing before the trial court was a construction of the April 23 order" is wholly inaccurate. As expressed and noted by the Alabama Supreme Court:

> "The January order and the [illegible] order together constitute one order of the Co[illegible]n.
>
> "The final order of April em[illegible]odies the order of January as modified, and is one order, analogous to the judgment or decree of a court or rehearing —"

The Petitioner's suggestion that (their brief, p. 11):

> "This decision left Petitioner and the public at large shipping inter-state goods with no remedy, no tribunal, and no procedure to protect their undisputed right of intra-town service."

is also incorrect. In the first place, no inter-state service was or could be involved. The Alabama Commission had no authority to grant any certificate to transport interstate freight, the jurisdiction of which is exclusively confined by Congress in the Interstate Commerce Commission (See 49 U. S. C., §303c).

The Petitioner again is in error when it suggests that it raised questions regarding the decision of the Alabama Supreme Court "at the earliest possible time" (their brief, p. 12). They neglected to note and inform this Court that Rule 34 of the Alabama Supreme Court provides for applications for rehearing and that Petitioner availed itself of this rule, but in its application Petitioner did not mention or suggest the constitutional or federal questions here sought to be raised for the first time.

REASONS FOR DENYING THE WRIT.

The Petitioner states that it relies upon **Saunders v. Shaw**, 244 U. S. 317, as justification for its presentation of the constitutional or federal questions here urged for the first time, but that case does not support Petitioner's position. In the first place no federal question is involved in this proceeding. As noted, this is a declaratory judgment action instituted by the Petitioner for the purpose of construing an order of a State regulatory commission granting, in part, and denying, in part, an application for an intrastate certificate of public convenience and necessity, after the Petitioner had failed to appeal from the

order of the Commission, and thus bring up for review the sufficiency of the evidence before the Commission on which the order was based (See Title 48, § 82, Alabama Code 1940, as amended). Had the Petitioner availed itself of its statutory right of appeal (§ 79)[2] the entire record before the Alabama Commission would have been certified (§ 83) to the Circuit Court which would consider the case on the record and set aside the order of the Commission if the Court found that (§ 82):

> ". . . the Commission erred to the prejudice of the Appellant's substantial rights in its application of the law; or, the order . . . was based upon a finding of facts contrary to the substantial weight of the evidence."

Having failed or neglected to appeal the Petitioner sought a construction of the certificate in declaratory judgment proceedings authorized by Title 7, § 157, Alabama Code 1940.

It is apparent that no federal question is here involved. Assuming, arguendo, that a federal question is involved (which Respondents deny) then it was not raised before or presented to the Alabama Supreme Court by petitioner. It is fundamental that before this Court will grant certiorari to review a decision of the State Supreme Court it must affirmatively appear that a federal question exists and that it was presented to the State Supreme Court and that its decision of the federal question was necessary to its determination of the cause. None of those requirements are here present. The general rule was stated by this Court in **Durley v. Mayo**, 351 U. S. 277, cert. den. 352 U. S. 859, as follows:

---

[2] Unless otherwise indicated all Section references in this brief will refer to Sections of Title 48, Alabama Code 1940, as amended, unless otherwise specifically indicated.

> "It is a well established principle of this Court that before we will review a decision of a State Court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to determination of the cause. **Honeyman v. Hanan**, 300 U. S. 14, 18; **Lynch v. New York**, 293 U. S. 52, and where the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it."

Following the decision of the Alabama Supreme Court here complained of the Petitioner filed a petition for reconsideration with that Court but did not raise or suggest any Federal questions in that petition. As noted, the petition was overruled by the Alabama Supreme Court on June 22, 1961.

The principle or rationale of **Saunders v. Shaw**, 244 U. S. 317, is not here involved since the Petitioner did not raise or suggest any federal question in its petition for reconsideration to the Alabama Supreme Court.

In **New York Ex Rel. Consolidated Water Company v. Maltbie**, 303 U. S. 158, the Petitioner sought to review the action of the State Court affirming an order of the State Public Service Commission ordering the utility to file a schedule of rates to reduce its annual operating revenues. This Court noted that:

> "Upon the review of the Commission's orders by certiorari, only questions of law were open under the State practice, including the question whether there was evidence to sustain the findings of the Commission. In that view no substantial federal question is presented."

Here the only question involved or presented to the Alabama Courts as specifically noted was "whether the order of the (Alabama) Commission is ambiguous."

The Alabama Supreme Court rendered no formal opinion in overruling Petitioner's application for rehearing. As noted in **Durley v. Mayo**, 351 U. S. 277, cert. den. 352 U. S. 859:

> "Where the highest Court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the *judgment*."

Thus, in the case here pending:

There is no federal question involved that could conceivably confer jurisdiction under 28 U. S. C. 1257 (3).

No federal question was presented or suggested to the Supreme Court of Alabama although the Petitioner had the opportunity to do so in its application for rehearing.

A decision on no federal question was necessary or pertinent to a proper determination of the declaratory judgment proceedings by the Alabama Supreme Court.

It affirmatively appears that the decision of the Alabama Supreme Court was on a State ground and that it properly construed the orders of APSC involved.

The Petitioner failed to note that in **Nat. Assoc. for the A. C. P. v. Alabama**, 357 U. S. 449, the petitioner raised Constitutional questions at the inception and insisted upon same throughout the proceedings in the State Court.

(a) **The Procedural Questions.**

As correctly noted by the Alabama Supreme Court the question involved in the declaratory judgment proceedings initiated by Petitioner "is simply one of construction of the orders." Neither the Circuit nor the Supreme Court of Alabama could properly engage in legislative action and issue a certificate. The Alabama Supreme Court recognized that "an action for declaratory judgment cannot be made a substitute for appeal." **Mitchell v. Hammond**, 252 Ala. 81, 39 So. 2d 582; **Howle v. Alabama State Milk Control Board**, 265 Ala. 189, 90 So. 2d 752, and noted that

> "The relief here sought was not a review of the propriety of the order of the Commission as such propriety might be determined on an appeal. The question is whether the order of the Commission is ambiguous."

Admittedly, and of necessity, the entire order of the Commission was before the Court for construction. The same procedure is open to the Petitioner now as would have been open had the Supreme Court ruled invalid only the April 23 order of the Commission. The Alabama Supreme Court earlier pointed out the procedure in **Smith Transfer Company v. Robins Transfer Company**, 253 Ala. 406, 63 So. 2d 351, which was also a declaratory judgment action to construe an order of the Commission. The Alabama Supreme Court there declared:

> "The power lies with the Alabama Public Service Commission to make its orders clearly reflect the intention of the Commission, and it is to that body that resort should be had for the amendment or change of its certificate of convenience and necessity and not to the courts".

As previously noted, the Petitioner apparently recognizing its legally untenable position already has filed an

application with the APSC identical with its original application. Any action of the Alabama Commission on the new application of the Petitioner (as was the order on the original) is appealable under Title 48, § 79, 301 (27) (Alabama Code 1940 as amended).

(b) No Property Rights of Petitioner Have Been Affected.

The Alabama Supreme Court rendered the only decision legally sound and possible under the facts. It held that the April order "embraced the order of January" and, as modified, was "one order", and that if the April 23rd order was void, as argued by the Petitioner, then the entire order was void.

The controlling case on the question presented to the Alabama Circuit and Supreme Court was **Wilkinson v. Stiles**, 200 Ala. 279, 76 So. 455, where the Alabama Supreme Court early adopted the general rule and declared that:

> "It is the general rule of statutory construction that if by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."

In 1 Lewis, **Southerland Statutory Construction** (2d Ed.), § 306, p. 597, it is declared that:

> "If, by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."

The proposition that a certificate of public convenience and necessity cannot be disapproved in part follows the general rule of statutory construction, as expressed in 59 **C. J.**, § 206, p. 646, as follows:

> ". . . where by striking out a void exception, proviso, or other restrictive clause, the remainder will have a broader scope than intended, the whole act is void."

Obviously, if the restriction in the certificate was stricken, then the scope of the certificate would become much broader than intended by the Commission.

A case almost, if not identical to the one presented to the Alabama Supreme Court is **Transcontinental Bus System, Inc. v. State Corporation Comm.**, 56 N. M. 158, 241 P. 2d 829. There, Transcontinental filed an action against the State Corporation Commission to vacate an order granting a certificate. The Supreme Court of New Mexico held that the trial court, on appeal, having determined that the order of the Commission was only lawful in part, was not authorized to amend the order and could only set it aside. Thus, in the **Transcontinental** case, the trial court, on appeal, held that a part of the order of the Commission was unjustified. The Supreme Court held that the trial court could not set aside a part of the order, but had to set aside the entire order, and that to set aside a part thereof and to affirm or order the balance of the certificate to be issued would be to engage in legislative and not judicial functions. In language particularly apropos, the court there declared:

> "To permit the court to amend or modify an order of an administrative agency is repugnant to the fundamental law providing for separation of powers of executive, legislative and judicial departments of our government. The administrative board or tribunal

acts in a legislative capacity and the trial court acts in a judicial capacity. To allow a court to amend or modify an order of our State Corporation Commission amounts to a substitution of the judgment of the court for that of the Commission and the court, in such a case, would be acting legislatively and not judicially."

In **Harris v. State Corp. Comm.**, 129 P. 2d 323, 327, The Supreme Court of New Mexico, in considering a motor carrier act similar to the Alabama Act declared:

"When our legislature enacted C. H. 154, L. 1933, it declared its purpose and policy to confer upon the Commission the power and authority to make it its duty to supervise and regulate the transportation of persons and property by motor vehicle for hire upon the public highways of this State and to relieve the undue burdens on the highways and to protect the safety and welfare of the traveling and shipping public and to preserve, foster and regulate transportation, and permit the co-ordination of transportation facilities."

"Manifestly, **this is a legislative and or administrative, and not a function of the judiciary**." (Emphasis supplied.)

The rule was also well expressed and applied in **Ill. Comm. Comm. v. N. Y. Cent. Ry. Co.**, 398 Ill. 11, 75 N. E. 2d 411, 415, where it is stated:

"The court, in reviewing an order of the Commerce Commission, must either confirm or set aside the order as a whole; and where the court reverses the order because a part of the same is invalid, it need not consider the validity of any other part of the order, since the invalidity of a part renders the entire order void."

Likewise, in **Gulf Transport Co. v. Ill. Comm. Comm.**, 402 Ill. 11, 83 N. E. 2d 336, the same rule was announced as follows:

> "**The court on review must either confirm or set aside the order as a whole, since the invalidity of a part renders the entire order void.**" (Emphasis supplied.)"

This rule is followed in numerous other decisions, such as **State ex rel. Anderson v. Public Service Commission**, 234 Mo. App. 470, 134 S. W. 1069; **State ex rel. Interstate Transit Lines v. Public Service Comm.**, 237 Mo. App. 554, 132 S. W. 2d 1082; **State ex rel. Mo. Pac. R. Co. v. P. S. C.**, 37 S. W. 2d 576; **Railway Express Agency v. Public Serv. Comm.**, 237 Mo. App. 420, 169 S. W. 2d 88.

(c) The Commerce Clause of the United States Constitution (Art. 1, § 8, Cl. 3) Is Not and Could Not Be Involved in an Intrastate Certificate.

The APSC has no jurisdiction over any shipments moving in interstate commerce. In arguing that the Commerce Clause of the Federal Constitution is or could be here involved the Petitioner is as confused as a gypsy who sings at the funeral and cries at the birth of a friend.

Any certificates issued by the APSC necessarily are restricted to intrastate shipments. In order to transport freight in interstate commerce a motor carrier for hire must obtain a certificate from the Interstate Commerce Commission under 49 U. S. C., Section 306, except that an intrastate carrier can file an application for registration under applicable regulations of the Interstate Commerce Commission and the Second Proviso of 49 U. S. C., Section 306 (a) (1). No evidence was introduced and none could have legally been received in any of the proceedings before

the Alabama Commission relating to the movement of interstate freight. Section 8 of the Alabama Motor Carrier Act [Title 48, Section 301 (8), Alabama Code 1940, as amended] empowers the Commission to issue certificates authorizing the transportation of intrastate freight. Part II of the Interstate Commerce Act provides (49 U. S. C., 306) that:

> "No common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the [Interstate Commerce] Commission authorizing such operations." (Parenthetical added.)

CONCLUSION.

The respondents respectfully submit that:

—There is no Federal question here involved which could possibly justify jurisdiction and review of the decision of the Alabama Supreme Court under 28 U. S. C., Section 1257 (3).

No Federal question was presented to the Alabama Supreme Court although the Petitioner had the opportunity to do so in the application for rehearing of any such question was involved.

—No decision on any Federal question was necessary by the Alabama Supreme Court in the determination of this cause which simply involved the construction of an order of the APSC relating to an intrastate certificate.

—An intrastate certificate does not and cannot authorize transportation of goods in inter-state commerce without

compliance with Part II of the Interstate Commerce Act by the carrier.

This Court will not grant certiorari where it affirmatively appears that the decision of the State Court rested upon a non Federal ground.

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Certificate of Service

State of Missouri,
St. Louis.

I, J. Guy Hood, being first duly sworn on oath, says that he is President and Treasurer of St. Louis Law Printing Co., Inc., and that he has served a copy of the foregoing Reply to Petition for Certiorari upon the attorneys for Petitioner, Goldbold, Hobbs & Copeland, by depositing a copy thereof in a United States Post Office with first class postage prepaid addressed to them at 330 Professional Building, Montgomery, Alabama, on the 18th day of September, 1961.

Subscribed and sworn to before me this 18th day of September, 1961.

(Seal) .....
Notary Public.

This act is performed in the City of St. Louis which adjoins St. Louis County, and for which I am commissioned.